

HOPPING GREEN SAMS & SMITH
PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS

123 SOUTH CALHOUN STREET
POST OFFICE BOX 6526
TALLAHASSEE, FLORIDA 32314

(850) 222-7500

FAX (850) 224-8551

FAX (850) 425-3415

www.hgss.com

Writer's Direct Dial No.
(850) 425-2313

July 31, 2000

GARY V. PERKO
MICHAEL P. PETROVICH
DAVID L. POWELL
JOHN K. POWELL
WILLIAM D. PRESTON
CAROLYN S. RAEPPLE
DOUGLAS S. ROBERTS
D. KENT SAFRIET
GARY P. SAMS
TIMOTHY G. SCHOENWALDER
ROBERT P. SMITH
DAN R. STENGLE
CHERYL G. STUART
W. STEVE SYKES
Of Counsel
ELIZABETH C. BOWMAN

RECEIVED
FPSC
BUREAU OF RECORDS
AND
REPORTING
JUL 31 11:32
AM '00

ORIGINAL

JAMES S. ALVES
BRIAN H. BIBEAU
RICHARD S. BRIGHTMAN
KEVIN B. COVINGTON
PETER C. CUNNINGHAM
RALPH A. DEMEO
WILLIAM H. GREEN
WADE L. HOPPING
GARY K. HUNTER, JR.
JONATHAN T. JOHNSON
LEIGH H. KELLETT
ROBERT A. MANNING
FRANK E. MATTHEWS
RICHARD D. MELSON
ANGELA R. MORRISON
SHANNON L. NOVEY
ERIC T. OLSEN

BY HAND DELIVERY

Blanca L. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket Nos. 990696-WS and 992040-WS

Dear Ms. Bayó:

Enclosed for filing on behalf of Nocatee Utility Corporation are the original and fifteen copies of Nocatee's Supplemental Response in Opposition to Motions for Continuance.

By copy of this letter, this document has been furnished to the parties on the service list. If you have any questions regarding this filing, please call.

Very truly yours,

Richard D. Melson

- APP
- CAF
- CMP
- COM 3
- CTR
- ECR
- LEG 2
- OPC
- PAL
- RGD *Goldner*
- SEC 1
- SER
- OTH

RDM/mee

Enclosures

cc: Service List
Mr. O'Steen
Mr. Skelton
Mr. Miller

129473.1

RECEIVED & FILED

man
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

09226 JUL 31 8

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates)
to operate water and wastewater utility)
in Duval and St. Johns Counties)
by Nocatee Utility Corporation)

Docket No. 990696-WS

In re: Application for certificates to)
operate water and wastewater utility)
in Duval and St. Johns Counties)
by Intercoastal Utilities, Inc.)

Docket No. 992040-WS

Filed: July 31, 2000

**NOCATEE'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO
MOTIONS FOR CONTINUANCE**

NOCATEE UTILITY CORPORATION ("NUC") hereby files its Supplemental Response in Opposition to the Supplemental Motion for Continuance (Supplemental Motion) filed on Wednesday, July 26, 2000, by Intercoastal Utilities, Inc. (Intercoastal) and the Motion for Continuance (County Motion) filed on Wednesday, July 26, 2000, by St. Johns County (County). For the reasons set forth below and in Nocatee's earlier response to the first motion for continuance filed by Intercoastal, the Commission should deny both motions.

1. Both the Supplemental Motion and the County Motion ask that the hearings in this case be continued in order to allow Intercoastal and the County additional time to consider the impact of an "Agreement for Wholesale Utilities, Operations, Management and Maintenance" (Agreement) entered into between NUC and JEA on Monday, July 24, 2000. The Agreement finalizes and formalizes the arrangements for NUC to obtain bulk water, wastewater and reuse service from JEA, and to obtain operation and management services from JEA, consistent with the earlier Letter of Intent between JEA and DDI (NUC's parent company) which has been fully described in earlier prefiled testimony of NUC's witnesses.

DOCUMENT NUMBER-DATE

09226 JUL 31 8 1099

FPSC-RECORDS/REPORTING

2. NUC fully and promptly disclosed the contents of this Agreement to the parties to this case. Intercoastal and the County, along with the Commission staff, were provided copies of the Agreement approximately 18 hours after its execution, at the start of Intercoastal's July 25th deposition of NUC's witness, Mr. Douglas Miller. This Agreement was the subject of almost two hours of questioning of Mr. Miller by counsel for Intercoastal and for the County. The fact that an Agreement would be negotiated to formalize the terms of the Letter of Intent had been discussed in the prefiled direct testimony of Mr. Miller and in two earlier depositions of Mr. Miller by Intercoastal and the Commission staff.

3. By noon today (July 31), NUC will be filing with the Commission, and serving on the parties, a Motion for Leave to File Supplemental Direct Testimony, along with attached Supplemental Direct Testimony of Mr. Douglas Miller and Ms. Deborah Swain. This filing will formally present the Agreement to the Commission and will describe its effect of slightly reducing NUC's operation and maintenance expenses, thereby enabling a small reduction in NUC's initial rates.

4. Despite their protestations to the contrary, no continuance is required in order to afford Intercoastal and the County the opportunity to fairly respond to the impact of this Agreement.

- (a) First, the County has not protested NUC's application and has not intervened in NUC's certificate application case. It is therefore entirely unclear how the County's rights are affected in any way by the finalization of this Agreement.
- (b) Second, Intercoastal has already had the opportunity, through Mr. Miller's deposition, to conduct discovery regarding the terms of the Agreement. In order to ensure that Intercoastal's rights are fully protected, NUC is willing to make both

Mr. Miller and Ms. Swain available for additional depositions related to their Supplemental Direct Testimony and to the Agreement and its impact on NUC's plan of service and proposed rates.

- (c) Although NUC finds it difficult to imagine how the execution of this Agreement would require additional rebuttal testimony by Intercoastal, NUC would not object to Intercoastal being given two work weeks, until the close of business on Friday, August 11, 2000, to file any supplemental rebuttal testimony that it deems necessary to deal with the effect of the Agreement.

In short, the rights of Intercoastal and the County can be fully protected without a continuance, simply by affording Intercoastal the opportunity to file supplemental testimony related to the Agreement and to conduct further depositions (if necessary) regarding the Agreement.

5. In paragraph 6 of its Supplemental Motion, Intercoastal states that it did not receive copies of two corrected maps which were filed with the Commission on Friday, July 14, and were served by U.S. Mail on the parties, including Intercoastal, on the same day. Upon learning from review of the Supplemental Motion that Intercoastal may not have received its service copy, NUC had additional copies hand-delivered to counsel for Intercoastal. The only change to this map was to correctly show the point of interconnection between NUC and JEA in Duval County at the intersection of U.S. 1 and realigned C.R. 210, rather than in St. Johns County at the intersection of U.S. 1 and existing C.R. 210. As described at page 7, line 22 of Mr. Miller's Direct Testimony filed on February 11, and as confirmed during his deposition on July 25, the proposed point of connection between NUC and JEA has always been in Duval County. Unfortunately, there was an inadvertent error in the maps attached to his testimony which was

corrected by the revised filing on July 14. This error was fully explored during Mr. Miller's deposition on July 25, and does not provide any legitimate basis to continue this proceeding.

6. The County Motion asserts that since, under the Agreement, some backbone water and wastewater mains in St. Johns County may be developed as Joint Projects by NUC and JEA and may ultimately be owned by JEA, rather than NUC, there is "a new and fundamental jurisdictional issue" involving facts that need to be developed through deposition and other means of discovery. (County Motion, ¶6) The only question relevant to the jurisdictional issue, however, is whether NUC will continue to provide service across the Duval/St. Johns County line. As shown by the Supplemental Direct Testimony of Mr. Douglas Miller being filed today, regardless of the ownership of the backbone mains, NUC will still own water, wastewater and reuse mains that physically cross the County boundary. Any additional facts that the County requires to flesh out its jurisdictional argument -- which to date has never been directed at NUC -- can be developed, if necessary, through an additional deposition of Mr. Miller or cross-examination at the hearing.

7. Finally, the County in its Motion and Mr. Twomey, through a letter dated July 28, 2000 to Chairman Deason, represent that some of the counties that were denied intervenor status in this proceeding intend to file notices of appeal or notices of interlocutory appeal. Both then assert that such a filing will, at least initially, result in an automatic stay of further Commission proceedings in these dockets under Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure. NUC submits that the County and Mr. Twomey are incorrect, and no automatic stay will result. First, the order denying intervention is an interlocutory order. It is therefore subject to appellate review under the "discretionary review" provisions of Rule 9.100(c)(2), Florida Rules of Appellate Procedure, related to petitions to review non-final agency action, not under the "notice

of appeal" provisions of Rule 9.110, Florida Rules of Appellate Procedure.¹ Charter Medical-Jacksonville, Inc. v. Community Psychiatric Centers of Florida, Inc., 482 So.2d 437 (Fla. 1st DCA 1985). The First District Court of Appeal has clearly held that the automatic stay provision of Rule 9.310(b)(2) applies only to appellate proceedings initiated by a notice of appeal, and does not apply to proceedings for discretionary review. State, Department of Health and Rehabilitative Services v. E.D.S. Federal Corporation, 622 So.2d 90 (Fla. 1st DCA 1993). Thus the filing by any of the counties for appellate review of the order denying intervention is not the type of filing that would trigger the automatic stay provisions.

8. In summary, neither Intercoastal's Supplemental Motion nor the County's Motion demonstrates any reason that a continuance is required. Any alleged harm to either party can be completely cured by granting more limited relief in the form of authorization to file supplemental rebuttal testimony (if required) and to re-depose Mr. Miller and Ms. Swain (if required) to address their Supplemental Direct Testimony and the final Agreement between NUC and JEA.

WHEREFORE, NUC urges that the Commission deny the motion for continuance, and allow this matter to proceed to hearing on the currently scheduled dates.

¹ As the Commission correctly stated in the "Notice of Further Proceedings or Judicial Review" appended to the order denying intervention:

Any party adversely affected by this order, *which is preliminary, procedural or intermediate in nature*, may request: . . . (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. . . . Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. *Such review may be requested* from the appropriate court, as described above, *pursuant to Rule 9.100, Florida Rules of Appellate Procedure*. (Emphasis added.)

RESPECTFULLY SUBMITTED this 31st day of July, 2000.

HOPPING GREEN SAMS & SMITH, P.A.

By:  _____

Richard D. Melson
P.O. Box 6526
Tallahassee, FL 32308
(850) 425-2313

Attorneys for Nocatee Utility Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following persons by Facsimile or E-Mail and U.S. Mail (*), or by U. S. Mail, this 31st day of July, 2000.

*John L. Wharton (facsimile)
F. Marshall Deterding
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301

Donald R. Odom
Chief Assistant County Atty
Hillsborough County, Florida
P.O. Box 1110
Tampa, FL 33601

*Samantha Cibula (e-mail)
FL Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Kathleen F. Schneider
Assistant County Attorney
1660 Ringling Blvd., 2nd FL
Sarasota, FL 34236

*Kenneth Hoffman (facsimile)
J. Stephen Menton
Rutledge, Ecenia, Purnell
& Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302

James G. Sisco
St. Johns County
P.O. Box 1533
St. Augustine, FL 32085

*Suzanne Brownless (facsimile)
1311-B Paul Russell Road
Suite 201
Tallahassee, FL 32301

Michael B. Wedner
St. James Building, Suite 480
117 West Duval Street
Jacksonville, FL 32202

Michael J. Korn
Korn & Zehmer
6620 Southpoint Drive South
Suite 200
Jacksonville, FL 32216

*Michael B. Twomey (facsimile)
Counsel Citrus/Collier Co.
P.O. Box 5256
Tallahassee, FL 32314-5256



Attorney